Supreme Court, U.S.
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No. 05-876

IN THE

Supreme Court of the United States

LAWRENCE SAVOCA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does *Almendarez-Torres v. United States* violate the fundamental imperative of the Sixth Amendment - as edified in *Apprendi* and its progeny - insofar as it allows a judge to raise a defendant's sentence beyond the sentence that could have lawfully been imposed by reference to the facts found by the jury. And therefore, did the procedure applied by the District Court to find that Petition was an "Armed Career Criminal," violate his rights guaranteed by the Fifth and Sixth Amendments.

2. Does the "Commerce Clause" of the Constitution provide federal courts with jurisdiction to prosecute an intrastate attempted robbery of an individual under the Hobbs Act, when the proof showed that even if the robbery had been carried to fruition, the conduct charged would not have materially or substantially effected interstate or foreign commerce.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit, *United States v. Lawrence Savoca*, 05-0967-cr, issued as a "Summary Order" pursuant to Rule 0.23 of the Local Rules of the Second Circuit Court of Appeals, is set out in the Appendix hereto as A-1 through A-6.

JURISDICTION

The judgement of the Court of Appeals for the Second Circuit was entered on October 3, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8 of the United States Constitution, the "Commerce Clause," provides: "The Congress shall have the Power to... regulate Commerce with...and among the several states."

The Fifth Amendment to the United States Constitution provides in relevant part that: "No person shall be...deprived of life, liberty, or property, without due process of law..."

The Sixth Amendment to the United States Constitution provides in relevant part that: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed... and to be informed of the nature and cause of the accusation against him..."

The "Hobbs Act," 18 U.S.C. § 1951, states in relevant part

that: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both."

The "Armed Career Criminal Act"("ACCA"), 18 U.S.C. § 924(e), states in relevant part that: "In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)... the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, that – is burglary..."

New York Penal Law §140.20, Burglary, states in relevant part that: "A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein." §140.30 provides that: "A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when:

1. In effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:

(a) Is armed with explosives or a deadly weapon; or

(b) Causes physical injury to any person who is not a

participant in the crime; or

(c) Uses or threatens the immediate use of a dangerous instrument; or

(d) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or

2. The building is a dwelling.

Section 140.00(2) of the New York Penal Law provides that: "'Building,' in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer..."

STATEMENT OF THE CASE

Following a trial to a jury in the United States District Court for the Southern District of New York (Robinson, J), Petitioner was found guilty of one Count of conspiracy to violate the Hobbs Act, 18 U.S.C. §1951(a); one count of an attempt to violate the Hobbs Act, 18 U.S.C. §1951(a) & §2; one count of the Use of a Firearm During a Crime of Violence, 18 U.S.C. §924(c)(1)(a)(iii); one count of being Felon in Possession of a Firearm in violation of 18 U.S.C. §922(g)(1).

Subject matter jurisdiction was vested in the District Court pursuant to 18 U.S.C. §3231 and Article III of the United States Constitution. Subject matter jurisdiction was vested in the United States Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. §1291 and §1294(1) and 18 U.S.C. §3742(a).

The Trial

The instant prosecution arose out of an attempted robbery which the government alleged was carried out by Petitioner and his brother, Salvatore Savoca. The theory of the government's case was that in the early morning hours of June 21, 2001,

Michael Geary, a man who owned a local tavern known as the "Rhino Grill," got into his car and drove the several miles from where the Rhino Grill was located, to his home in a rural section of Mahopac, New York. (Tr. 77[1])

The evidence showed that as soon as Mr. Geary exited his automobile, an unknown white male - wearing a stocking stretched over his head to disguise his face - came out of the nearby bushes adjoining the driveway and told him to "put up his hands." (Tr. 77; 80; 88) However rather than putting up his hands, Geary lunged at the man. In a panic, his assailant's gun discharged, the bullet hitting Mr. Geary and causing a superficial wound in the front of his thigh. His assailant then fled down the dark driveway. No money or other property was taken from Mr. Geary. Although Geary claimed to have had some of the cash proceeds from his tavern in his pants pocket that evening, no monies or other property were ever offered into evidence at the trial, nor did any police officer or other witness testify to ever having seen or otherwise verify the existence of such proceeds on the night of the attempted robbery. (Tr. 77)

Approximately 15 months after this attempted robbery - in an entirely unrelated incident - police in the Bronx, New York arrested a man by the name of William Lacerenza. A search of Mr. Lacerenza's car revealed a .25 caliber hand gun and an invitation to an engagement party for the Petitioner, Lawrence Savoca. Through subsequent computer analysis, the police were able to match the shell casing recovered from the Geary driveway with the weapon found in Lacerenza's car.

As a result of discovering this hand gun and the invitation, police from the Carmel Police Department ultimately interviewed Nicole Pocchia, the former girlfriend of Petitioner's brother, Salvatore Savoca and also Sandra DeLucca, the ex-

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1. "Tr." is a reference to the trial transcript.

girlfriend of the Petitioner. Each woman gave a statement to the police.

Nicole Pocchia was an admitted drug addict who revealed that beginning at approximately 14 years of age (Tr. 447) she began using a whole range of different illegal drugs. (Tr. 447; 548-549) She admitting using the hallucinogenic drug Ecstasy 30 or 40 times over the course of a year. (Tr. 548-549) She conceded that she had been addicted to cocaine and estimated that she had used cocaine over 300 times. (Tr. 549) She further explained that she took crystal methamphetamine a "few times a week," during the same time period she was addicted to cocaine.(Tr. 550) She admitted taking a drug called Ketamine, also known as "Special K," a form of cat tranquilizer. (Tr. 551) Finally, she testified that from time to time she took hallucinogenic mushrooms. (Tr. 551) While she claimed that at the time of the events in question she had rather abruptly stopped taking drugs, she conceded that she was nonetheless "drinking heavily" during that period. (Tr. 552)

Ms. Poccia told an improbable story, contradicted by much of the empirical proof at the trial. She claimed that on the night of the attempted robbery, rather than being in bed she was waiting in her car at the end of the long driveway that led to the basement apartment that she shared with Petitioner's brother, Salvatore Savoca.

She testified that at 3:20 a.m. in the morning she was awakened by a bat in her bedroom. (Tr. 424-428; 613; 969) She put a blanket over her head, crawled out of the bedroom into living room, picked up the portable phone from the coffee table and then crawled back into the bedroom where the bat was. Once back in the bedroom - and notwithstanding her claim that she was "terrified" by the bat flying around the room - five foot one Nicole Pocchia purportedly climbed up onto a dresser approximately four feet high, and while holding the portable phone in one hand, with the other hand she claimed to have

removed a series of steel pins from the screen covering the window, opened the basement window, and climbed out onto the ground. (Tr. 475; 477-480; 608)

Nicole Pocchia then testified that after waiting in her car for over an hour in the pitch black night, she finally saw a car approaching. Even though she watched the car drive directly towards her for approximately a quarter of a mile, she claimed that somehow its headlights did not effect her night vision. (Tr. 502) When the car finally stopped she saw Salvatore Savoca exit, and for the brief moment that the car door opened and the dome light allegedly came on, she saw Lawrence Savoca in the driver's seat. (Tr. 500-501)

After Sal got out of the car, he allegedly told her; "that he thought he killed somebody." (Tr. 506). Then, according to Ms. Pocchia, Sal went inside. She made no further mention of any bat, he took a shower and they both went off to bed. When asked why she didn't question him further - after he had purportedly told her he thought he had just killed someone - she responded; "Well, if Sal didn't want to talk, I did not talk. (Tr. 507)

However Ms. Poccia went on to claim that over the course of the next few days, several conversations transpired in which Salvatore Savoca implicated his brother has having driven the car on the night he attempted to rob Michael Geary.

Nicole claimed that Sal told her that "Larry had driven to the Geary residence... had let Sal out of the car [and] Larry had driven down the road" to wait for him. (Tr. 436) This account appeared empirically impossible, since it would have meant that Larry had driven to the Geary residence before Geary drove there. The proof however, showed that the road to Geary's house was very long and extremely narrow, and for two cars to pass one another, one would literally have to "pull out of the road bed." If Larry Savoca was indeed waiting "down the road" in his car for Sal, Geary would have had to have passed, and of

course seen the car, since the roads were so narrow. (Tr. 204)

In addition, Nicole claimed that Salvatore Savoca told her that after the attempted robbery: "Sal ran down through the woods. He dropped the gun in the garbage can, and then he went and met Larry up in the car down the road." (Tr. 436) And further that; "they went back and retrieved the gun from the trash." (Tr. 437) Conversely, Geary had testified that after the attempted robbery, his assailant fled down his driveway (not "through the woods"), that he didn't hear any metallic sounds and that he never heard another car, nor saw the headlights of any other car. (Tr. 212-213)

For Nicole Pocchia's story about what Sal purportedly told her to have been true, it meant that after the attempted robbery Salvatore Savoca would had to have; (1) thrown the gun in a trash can, (2) run back to the car in which Larry was purportedly waiting - and which the proof showed would had to have been at least a quarter of a mile away (if not more), (3) that Larry and he would then had to have walked or driven back to the scene, (4) looked for, and successfully found the gun in the right garbage can in the total darkness, and (5) then returned to their car and driven back down the only road in or out of the area.

What made this account ever more incredible, was that the first officer to respond to the scene testified that he arrived at the Geary residence approximately four to five minutes after the event (and explained that the ambulance was already on the scene). He further stated that even though he came up the only road in or out, he saw no one running on any road, that he did not see any cars parked in the roadway nor did he see or pass any cars on the road. (Tr. 244-245; 257-258)

Several months after this incident, Nicole's and Salvatore's stormy relationship ended acrimoniously. On cross examination defense counsel examined her concerning the fact that the first time that she ever told anyone this story, was when the police